A

TENAGA NASIONAL BHD

v.

TECK SEE PLASTIC SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
SITI MARIAH AHMAD J
[SUIT NO: D6-22-3211-1998]
25 JUNE 2007

C ***PUBLIC UTILITIES:*** *Electricity - Factory usage - Faulty meter installed causing it to record lesser units of electricity consumed - Claim for estimate loss - Whether defendant should burden the loss as a result of using electricity sold and delivered - Whether plaintiff entitled to claim for alleged 'under billed' electricity consumption - Whether there was* D *negligence on plaintiff's part in installing faulty meter system - Whether plaintiff's claim time barred under s. 6 Limitation Act 1953*

The plaintiff had sold and supplied electricity to the defendant's factory under Kontrak Belakan Elektrik between the plaintiff and E the defendant. The defendant was a manufacturer of plastic injection moulding parts for use in automobile, electrical and electronic parts. On 15 August 1990, the plaintiff installed a meter at the defendant's factory to record the electricity consumed by the factory. On 11 July 1996, the plaintiff discovered that the F meter installed was faulty which caused the meter to record lesser units of electricity consumed at the defendant's factory. The plaintiff had all this while billed the defendant monthly and the defendant had duly paid the bills. The plaintiff had made an estimate loss calculation of RM2,270,209.70 for the said G irregularities of the meter for the period from September 1990 to August 1996 and demanded the same from the defendant. The defendant failed to pay and therefore the plaintiff prayed for the said sum. The defendant in their defence contended that the plaintiff was formerly known as Lembaga Letrik Negara Tanah H Melayu (LLN), a statutory body incorporated under s. 3 of the Electricity Act 1949, which was repealed and replaced by the Electricity Supply Act 1990 and submitted that the plaintiff thereon was no longer a statutory body. The issues that arose for determination were: (1) whether it was right at law that the I defendant should burden the loss as a result of using electricity which have already been sold and delivered; (2) whether the

plaintiff was entitled to claim from the defendant for an alleged 'under billed' electricity consumption due to the wrongful installation of the meter by the plaintiff's servants and/or agents at the defendant's premises; (3) whether the plaintiff was entitled to claim from the defendant an estimated amount instead of an actual amount; (4) whether the plaintiff was negligent in installing a faulty meter system so as to raise a set off and (5) whether the plaintiff's claim was time barred under s. 6 Limitation Act 1953.

Held (allowing plaintiff's claim):

(1) The Minister of Energy, Telecommunications and Posts declared the transfer date where all properties, rights and liabilities to which the board was entitled to or subject to, were transferred to the plaintiff as of 1 September 1990. Therefore all rights and liabilities to which LLN was entitled to or subject to immediately before 1 September 1990 arising from the contract was transferred to the plaintiff. In the case of *Public Textiles Berhad v. Lembaga Letrik Negara* the Federal Court decided that LLN was entitled to claim from the consumer any amount undercharged for electricity energy supplied notwithstanding that the undercharging was due to error or mistake by LLN. Thus, the right enjoyed by LLN under the laws of Malaysia immediately prior to 1 September 1990 had vested in the plaintiff by virtue of s. 3 of the Electric Supply (Successor Company) Act 1990. Therefore it was right at law that the defendant should burden the loss of RM2,270,209.70 as a result of using electricity which have already been sold and delivered. (paras 25, 26, 27)

(2) The Licensee Supply Regulations 1990 permits the plaintiff to raise a claim against the defendant for the amount undercharged for the supply of electrical energy. However, the amended r. 11(2) only allows discharging of not more than three months from the date the consumer has been informed about being undercharged. This amendment nevertheless came into force on 15 December 2002 after this suit was filed and hence after the present cause of action arose. The amendment should be construed as a prospective and not retrospective provision. It was therefore clear that at the time of breaches

complained by the plaintiff the earlier rule would still be applicable. In this case the plaintiff was entitled to claim against the defendant amount undercharged. (paras 31, 32, 33 & 34)

(3) The defendant had considered the low electricity charges in pricing its manufactured goods. The defendant would have been able to price its goods lower than other manufacturers in the same field and monopolized the market thus making profit out of cheap electricity. Therefore it could be concluded that the plaintiff was entitled to claim from the defendant an estimated amount instead of an actual amount. (para 38)

(4) Since negligence was not proven, the defendant was not entitled to set off the plaintiff's claim for the undercharged electricity energy. (para 41)

(5) The breach had occurred on 12 June 1998 *ie*, when the defendant's solicitors informed the plaintiff's solicitors that the defendant was denying liability to pay the under-charged sum. Since the action was filed by the plaintiff on 15 September 1998, the action was not time barred. (para 45)

Case(s) referred to:

Arab Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ong and Other Appellants [2003] 1 CLJ 585 CA ***(refd)***

Hock Seng Company Sdn Bhd v. Tenaga Nasional Berhad [2000] MLJU 571 ***(refd)***

JR Munday Ltd v. London CC [1916] 2 KB 331 ***(refd)***

Public Textiles Berhad v. Lembaga Letrik Negara [1976] 2 MLJ 58 ***(refd)***

Tan Boon Yen dan Lain-lain v. Maybank General Assurance Berhad [2003] 2 CLJ 268 HC ***(refd)***

Legislation referred to:

Electricity Act 1949, s. 3
Electric Supply (Successor Company) Act 1990, s. 3(4)
Licensee Supply Regulations 1990, rr. 3(1), 11(1), (2), (3)
Limitation Act 1953, s. 6

For the plaintiff - K Nayagam (ML Lam with him); M/s Skrine
For the defendant - Joginder Singh; M/s Joginder Singh

Reported by Suhainah Wahiduddin

JUDGMENT

Siti Mariah Ahmad J:

The Background Facts

[1] The plaintiff at all material times sold and supplied electricity to the defendant's factory under Kontrak Bekalan Elektrik 3105/90 dated 23 June 1990 between the plaintiff and the defendant. The defendant manufactures plastic injection moulding parts for use in automobile, electrical and electronic parts.

[2] On 15 August 1990, the plaintiff installed a meter at the defendant's factory to record the electricity consumed by the factory. On 11 July 1996, the plaintiff discovered that the meter installed was faulty which caused the meter to record lesser units of electricity consumed at the defendant's factory.

[3] The plaintiff had all this while billed the defendant monthly and the defendant had duly paid the bills. The plaintiff had made an estimate loss calculation of RM2,270,209.70 for the said irregularities of the meter for the period from September 1990 to August 1996 and demanded the same from the defendant. The defendant fails to pay.

Therefore the plaintiff prays for:

- A sum of RM2,270,209.70
- Interest at the rate of 8% per annum from 21 April 1998 to the date of full payment
- Costs

The Defendant's Defence

[4] The defendant in their defence contended that the plaintiff was formerly known as Lembaga Letrik Negara Tanah Melayu (LLN). LLN was a statutory body incorporated under s. 3 of the Electricity Act 1949. The Electricity Act 1949 was repealed and replaced by the Electricity Supply Act 1990. The plaintiff thereon is no longer a statutory body.

[5] The defendant said the plaintiff ought to have known that the defendant would price the manufactured products for sale to its customers by taking into account the cost of electricity consumed in the manufactured of the products. Goods were sold and payments received. It will not be equitable to burden the defendant with the alleged loss suffered by the plaintiff.

[6] The defendant admits there were irregularities in the metering system. These irregularities however were caused by the negligence of the servants or agents of the plaintiff who had changed the metering system by installing a meter system which was defective. The defendant has not committed any breach of contract or act or omission in tort, which are the basis for any claim for relief. By the plaintiff's own act of negligence, the plaintiff has caused its own loss.

[7] The defendant bills the plaintiff every month for the amount of electricity consumed which have been duly paid. The plaintiff has led the defendant to believe that the bills were accurate. By believing this, the defendant based these charges for the purpose of costing their manufactured products for sale to its customers. Therefore the plaintiff is estopped from claiming the said sum.

[8] The plaintiff is also time barred to bring this claim under s. 6 Limitation Act 1953.

Issues For Determination

1. Whether it is right at law that the defendant should burden the loss of RM2,270,209.70 as a result of using electricity which have already been sold and delivered;
2. Whether the plaintiff is entitled to claim from the defendant for an alleged 'under billed' electricity consumption due to the wrongful installation of the meter by the plaintiff's servants or/agents at the defendant's premises;
3. Whether the plaintiff is entitled to claim from the defendant an estimated amount instead of an actual amount;
4. Whether the plaintiff was negligent in installing a faulty meter system so as to raise a set-off; and
5. Whether the plaintiff's claim is time barred.

Evidence Of Witnesses

[9] A total of five witnesses were called to give evidence. The plaintiff in their case called upon three witnesses whereas the defendant in return called two witnesses.

The Evidence Of Mispani Bin Sakijo (PW1)

[10] PW1 was the plaintiff's Customers Services Manager from 1996 until 1997. PW1 is currently a senior engineer in the plaintiff.

[11] As a Customers Services Manager, PW1 had to manage the plaintiff's accounts in Shah Alam. In the debit note from the plaintiff to the defendant, it is written that a recalculation will be made based on the pro-rata usage of the defendant for electricity consumption amounting to RM2,935,587.88.

[12] PW1 testified that the pro-rata calculation is one of the available methods of calculation for under-billing. According to him another method is called the percentage calculation. He also said the amount would have been higher than RM2,935,587.88 had the percentage calculation been used. According to PW1 from the lab record it was only recorded 30.1% of supposed to be actual usage with error of 69.9%. PW1 agreed there was mistake in meter installation at defendant's factory.

The Evidence Of Wan Md Nor Bin Wan Ahmad (PW2)

[13] PW2 was the Plaintiff's District Manager for Shah Alam from 1996 until 1997. PW2 is currently an engineer in the plaintiff.

[14] As a district manager, PW2 was responsible for the operations in Shah Alam including customers services. The debit note referred to by PW1 was made on instruction of PW2.

The Evidence Of Anuar Bin Hanafiah (PW3)

[15] PW3 was the Plaintiff's Assistant Manager for Selangor in 1996. PW3 is currently an engineer in the plalintiff. As an assistant manager, PW3 was responsible to check and investigate faulty meters, repair them and make estimated calculations on the loss incurred by the plaintiff. This was done by PW3 with regards to the defendant.

[16] PW3 also testified that during the installation, they do not know that the meter has defect. According to him only during routine inspection it was discovered the meter was defective. This witnesses also confirmed that the percentage of error was 69.9%.

The Evidence Of Lim Yaw Yew (DW1)

[17] DW1 is the senior accounting manager in the defendant and is responsible for all accounting and financial matters of the defendant.

[18] He testified that the cost of electricity used to run the machines is taken into account for direct costs. He also stated that all the products manufactured by the defendant had been sold to customers during September 1990 to August 1996. DW1 said thus the defendant will not be able to recover the amount claimed for from their customers to whom products manufactured had been sold.

[19] Witness agreed that the percentage of cost of electricity in the product costing and pricing in 1992 to 1995 was around 3% to 5%. Witness also agreed that market forces such as state of economy, competition, quality of product, supply and demand play significant role in pricing. DW1 also agreed that market forces are more important than the cost of electricity.

The Evidence Of Boey Hon Mun (DW2)

[20] DW2 was the Defendant's Finance/Administration Manager from 1984 to 1994. DW2 was responsible for all accounting and financial and administrative matters.

[21] DW2 testified that the cost of electricity used to run the machines is taken into account for direct costs. All the products manufactured by the defendant had been sold to customers during September 1990 to August 1996. Thus the defendant will not be able to recover the amount claimed for from their customers to whom products manufactured had been sold.

[22] Findings Of The Court

Issue 1

Whether it is right at law that the defendant should burden the loss of RM2,270,209.70 as a result of using electricity which have already been sold and delivered.

[23] The Electricity Supply Act 1990 (Act 447) and the Electricity Supply (Successor Company) Act 1990 both came into force on 1 September 1990. Section 3 Electric Supply (Successor Company) Act 1990 states that the "Vesting of property, etc, of the board in the successor company, all properties, rights and liabilities to which the board was entitled to or subject to, were transferred to the plaintiff ie, the successor company". Rights and liabilities is explained in s. 3(2) as "rights which the board is entitled to or, as the case may be, liabilities to which the board is subject to, whether under the laws of Malaysia or any country outside Malaysia".

[24] Section 3(4) provides that "every right and liability transferred ... to the successor company may, on and after the transfer date, be sued on, recovered or enforced by or against the company in its own name ...".

[25] The Minister of Energy, Telecommunications and Posts declared the transfer date where all properties, rights and liabilities to which the board was entitled to or subject to, were transferred to the plaintiff as of 1 September 1990. Therefore all rights and liabilities to which LLN was entitled to or subject to immediately before 1 September 1990 arising from the contract were transferred to the plaintiff.

[26] In the case of *Public Textiles Berhad v. Lembaga Letrik Negara* [1976] 2 MLJ 58 the Federal Court decided that LLN was entitled to claim from the consumer any amount under-charged for electricity energy supplied notwithstanding that the under-charging was due to error or mistake by LLN and/or its agent/servant. Thus the right enjoyed by LLN under the laws of Malaysia immediately prior to 1 September 1990 has vested in the plaintiff by virtue of s. 3.

[27] Therefore it is right at law that the defendant should burden the loss of RM2.270,209.70 as a result of using electricity which have already been sold and delivered.

[28] *Issue 2*

Whether the plaintiff is entitled to claim from the defendant for an alleged 'under billed' electricity consumption due to the wrongly installation of the meter by the plaintiff's servants or/agents at the defendant's premises.

[29] Rule 3(1) of the Licensee Supply Regulations 1990 provides that "A licensee may recover from a consumer any charges due to him in respect of the supply of electricity, or in respect of the supply and fixing of any electricity meter, supply line or electrical equipment". Rule 11(1) goes on to say that "The licensee shall provide and fix such meters as it consider necessary for the measurement of the supply of energy to a consumer. Where additional meters are installed by the license at the request of the consumer the charge as determined by the licensee shall be paid by the consumer".

[30] Rule 11(2) states that "The reading of the consumer's meter shall be *prima facie* evidence of the amount of electrical energy consumed, provided that should the supply registered by the meter at any time is not equal to the energy consumed or the meter is not registering the actual consumption due to fault installation, the licensee may make a charge for the supply of energy". Finally r. 11(3) states that "In the event that the supply of meters at any time is not equal to the demand, the licensee may make a fixed monthly charge for the supply of energy".

[31] Therefore it can be concluded that the Licensee Supply Regulations 1990 permits the plaintiff to raise a claim against the defendant for the amount undercharged for the supply of electrical energy as stated in a similar unreported Higjh Court case of *Hock Seng Company Sdn Bhd v. Tenaga Nasional Berhad* [2000] MLJU 571 it was held "... Oleh itu, menurut peruntukan Peraturan-peraturan Bekalan Pemegang Lesen 1990 [khasnya peraturan (3) dan (12)] Defendan adalah berhak terhadap caj tambahan bagi penggunaan tenaga elektrik yang tidak atau gagal direkod dan Plaintif tidak boleh mengatakan atau menimbulkan alasan bahawa Defendan diestop daripada menuntut bayaran bagi penggunaan elektrik yang tidak direkod".

[32] It must however be noted that the amended r. 11(2) only allows undercharging of not more than three months from the date the consumer has been informed about being undercharged. The amended r. 11(2) states that "The reading of the consumers meter shall be *prima facie* evidence of the of electricity consumed, provided that in the event a consumer has been undercharged or overcharge as a result of:

(a) meter inaccurary;

(b) malfunctioning of the meter or its associated installation or part thereof;

(c) incorrect meter reading;

(d) incorrect application of a meter multiplying constant;

(e) cross-connection of installation to differentiate accounts; or

(f) faulty installation,

the licensee shall make retrospective adjustments to the consumer's account in respect of consumption and demand for such period by taking into consideration the licensee's records, the consumer's consumption record and history, available technical evidence and other relevant circumstances to rectify such undercharged or overcharged situation:

Provided that the period for any retrospective adjustment shall not exceed three months from the date the consumer has been informed about being undercharged or overcharged."

[33] This amendment nevertheless came into force only on 15 December 2002 after this suit was filed and hence after the present cause of action arose. The amendment cannot be supposed to have been meaningless, and the fact that it was thought necessary to amend the rule in order to incorporate a limit on the amount of time for which the plaintiff can claim arrears indicates that no such limitation applied under the unamended rule.

[34] The amendment should be construed as a prospective and not retrospective provision. It is therefore clear that, at the time of breaches complained by the plaintiff the earlier rule would still be applicable. In this case the plaintiff was entitled to claim against the defendant the amount under charged.

[35] *Issue 3*

Whether the plaintiff is entitled to claim from the defendant an estimated amount instead of an actual amount.

[36] PW1 confirmed that the sum claimed for was based on the 'pro-rata' calculation. PW1 went on to say that the pro-rata calculation is one of the available methods of calculation for under-billing. The other method is the 'percentage' calculation. PW1 also demonstrated during evidence that the amount claimed would have been higher had the 'percentage' calculation been adopted.

[37] It must also be noted at all times, the correctness of any of these amounts have not been challenged nor contradicted by the defendant.

[38] Moreover, the defendant had considered the low electricity charges in pricing its manufactured goods. The defendant would have been able to price its goods lower than other manufacturers in the same field and monopolized the market thus making profit out of cheap electricity. Therefore, it can be concluded that the plaintiff is entitled to claim from the defendant an estimated amount instead of an actual amount.

[39] *Issue 4*

Whether the plaintiff was negligent in installing a faulty meter system so as to raise a set-off.

[40] For the defendant to prove negligence, 4 ingredients must be established namely:

(a) the plaintiff owes the defendant a duty to take reasonable care;

(b) the plaintiff breached the duty;

(c) as a result of the breach, defendant suffered damage; and

(d) the damage suffered is not too remote.

See: *Arab Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ong and Other Appellants* [2003] 1 CLJ 585. It is clear in this case that the defendant has not proven actual damage which is an essential ingredient in the sort of negligence and thus fails to prove negligence on the part of plaintiff towards the defendant. This can be seen in the case of *JR Munday Ltd. v. London C.C* [1916] 2 KB 331 where it was held that 'Negligence alone does not give a cause of action, damage alone does not give a cause of action; the two must co-exist'.

[41] Since negligence is not proven, the defendant is not entitled to set-off the plaintiff's claim for the under-charged electricity energy.

[42] *Issue 5*

Whether the plaintiff's claim is time barred.

[43] Under the law of contract, time begins to run from the date of breach of contract. So when did the breach occur? In *Tan Boon Yen dan Lain-lain v. Maybank Assurance Berhad* [2003] 2 CLJ 268 the principle which can be adopted in this case is that the date which the plaintiff's cause of action accrued was on the date when the defendant denied liability.

[44] According to the defendant the breach accrued in September 1990 from which the date the plaintiff is claiming for the alleged under billed amount. Nevertheless, this is not the date when the breach occurred but rather when the damage occurred.

[45] I am of the opinion that the breach occurred on 12 June 1998 ie, when the defendant's solicitors informed the plaintiff's solicitors that the defendant was denying liability to pay the under-charged sum. Since the action was filed by the plaintiff on 15 September 1998, the action was not time barred.

Conclusion

[46] From the evidence by the witnesses, facts of the case and from parties' submissions, the court is of the opinion that the plaintiff has proven its case. Therefore the plaintiff's claim is allowed with costs.